ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)	CS Docket No. 95-61

REPLY COMMENTS OF
COMCAST CABLE COMMMUNICATIONS, INC.

Brenda L. Fox
Michael S. Schooler
Steven F. Morris

Dow, Lohnes & Albertson
1255 Twenty-Third Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2500

Counsel for Comcast Cable Communications, Inc.

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REPLY COMMENTS

Comcast Cable Communications, Inc. hereby submits its reply comments in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

The Notice of Inquiry in this proceeding seeks information and policy recommendations regarding a wide range of issues related to the status and promotion of competition in the video programming marketplace. For the most part, as the Commission has acknowledged, these are not new issues, and Comcast and others have addressed them in numerous other proceedings at the Commission.

But the proceeding raises a broader issue that transcends the more particular questions raised in the Notice. Specifically, while the proceeding focuses on "competition in the market for the delivery of video programming," it is now more clear than ever that the status of competition in the video marketplace is inextricably linked to the status of competition in the provision of non-video telecommunications services. This is because it is now technologically feasible for cable operators and telephone companies each to provide a broad range of video and telephony services over their facilities. Ultimately, protecting and promoting facilities-based competition between cable operators and telephone companies is the best way to provide consumers with a diversity of video programming and telecommunications services at the lowest prices. This is the context in which the Commission's annual assessment of the status of competition in the video marketplace should be conducted. And it is precisely this context that the telephone companies, in their comments, seek to obscure.

Thus, the telcos seek generally to portray themselves in this proceeding as "fledgling entrants constrained by regulation at every turn into a marketplace dominated by well-financed, entrenched and aggressive monopolists."[1/] By focusing solely on their status as new entrants in the video marketplace (in which cable already faces competition from DBS, MMDS, SMATV and broadcast television) and ignoring their longstanding (and, so far, unassailable)[2/] entrenched monopoly in the provision of essential local exchange service, the telephone companies seek special relief from rules and safeguards designed to prevent them from unfairly subsidizing their video services and facilities

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1/ GTE Comments at 4.

2/ See "Ringing Out the Last Monopoly?," Washington Post, July 25, 1995, p. C1.

with telephone ratepayer revenues. Moreover, they argue that they should have guaranteed access to programming developed and owned by other cable operators but should not be required to make <u>their</u> programming available to others in a comparable manner.

Despite their complaints, there is no evidence that the Commission's regulatory process has impeded the ability of the telephone companies to compete effectively and efficiently in the provision of video programming. To the contrary, the comments themselves suggest that the telcos do not yet have in place the technology that they believe to be most effective and efficient -- although, absent regulatory scrutiny, they might have chosen, to the detriment of captive telephone ratepayers, to deploy a less efficient technology.

Furthermore, there is no public policy basis for forcing cable operators to make their programming available to telcos (and other multichannel video programming distributors, such as DBS and MMDS providers) while allowing telcos to retain exclusive distribution rights to their own programming. As a general matter, freeing telco providers of video programming from the obligations imposed upon cable operators will neither promote nor ensure a competitive marketplace. It will only give the telcos, with their established dominance in the local exchange market, an unwarranted opportunity to thwart fair facilities-based competition. But it would be especially unfair and anticompetitive to relieve the telcos of the obligations of the cable program access rules with respect to their vertically-owned programming while, at the same time, allowing them to reap the benefits of those rules with respect to cable-owned programming.

I. REGULATION OF TELCO PROVISION OF VIDEO FACILITIES AND SERVICES HAS PRESERVED, NOT THWARTED, THE PROSPECT OF FACILITIES-BASED COMPETITION.

The telcos, in their comments, blame the Commission's regulatory process -- in particular, the requirement that proposals to deploy video facilities be scrutinized in advance pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214 -- for delaying their provision of video dialtone service.[3/] Moreover, they claim that if, in addition to the supposed burdens of the Section 214 process, they are required to comply with the provisions of Title VI of the Act whenever they provide their own programming over their facilities, they simply will have no incentive to provide video dialtone service rather than traditional cable television service.[4/]

Although these warnings are meant to suggest that application of the Section 214 process and the requirements of Title VI pose a threat to the prospect of competition in the video marketplace, closer scrutiny of the telcos' comments makes

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3/ See, e.g., Bell Atlantic Comments at 3-5; GTE Comments at 9-10; BellSouth Comments at 2-4.

4/ See, e.g., NYNEX Comments at 5; BellSouth Comments at 5-7; Bell Atlantic Comments at 7; GTE Comments at 10-11.

clear that this is not the case. First, Bell Atlantic reiterates in its comments what it stated when it withdrew its Section 214 applications throughout its telephone service areas -- that "technological developments that occurred during the pendency of the authorization process forced it to reassess the technology and architecture to be used for large-scale deployment of these [hybrid fiber-coaxial] systems," and that once it completes its negotiations and plans for deployment of switched digital fiber systems, it "will file new Section 214 applications with the Commission, if required to do so."[5]

What this means is that the prospect of Section 214 scrutiny will not deter Bell Atlantic from deploying the video technology that it deems most efficient and effective. And what it suggests is that, absent such scrutiny, Bell Atlantic might have had incentives to deploy in haste a less desirable technology, which it could have subsidized with telephone ratepayer revenues. In these circumstances, to the extent that the Commission's application of Section 214 requirements has delayed Bell Atlantic's entry into the video marketplace, the delay has served to promote, not thwart, facilities-based competition.

Second, other telcos' comments indicate that, in their view, the most effective and efficient way for telephone

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5/ Bell Atlantic Comments at 14 (emphasis added). See generally "Phone Giants Discover the Interactive Path Is Full of Obstacles," Wall Street Journal, July 24, 1995, p.1A.

companies to use their facilities to compete in the video marketplace is not to provide video dialtone service but to provide traditional cable service. BellSouth says it directly: "The best prospect for wire-based competition to cable television is not VDT; it is LEC provision of cable service."[6] So does SBC Communications Inc., which "has made no secret of its views of video dialtone" and has submitted no proposals to provide such service: "Telephone company affiliates should be able to choose to operate as a Title VI cable company, using its telephone delivery system as the backbone, without being required to provide capacity to unaffiliated providers."[7]

GTE indirectly suggests the same thing. It states that

> in order to be successful, LECs must be able to design pricing structures which support both the needs of larger multichannel service packagers as well as smaller *a la carte* programmers . . . . Only by allowing market forces to govern VDT rates will programmers utilizing VDT networks be positioned to offer rates and service packages to subscribers that are competitive with existing cable offerings, thereby bringing the benefits of competition to consumers.[8]

6/ BellSouth Comments at 4.

7/ SBC Comments at 4 (footnote omitted). SBC maintains that the video dialtone rules "are simply inadequate to support a realistic business case," and notes that other RBOCs that "have entered into VDT deployments have found the open enrollment process poses a serious impediment to their offer of a viable video alternative to the incumbent cable system." Id. at 2 (footnotes omitted).

8/ GTE Comments at 6.

But the essence of video dialtone service is nondiscriminatory common carriage. If the telcos were to offer capacity on unregulated, discriminatory terms, its service would not be materially different from cable service. And, according to GTE, this is the only way that telcos can effectively compete in the video marketplace -- unless, of course, the telcos are either allowed to cross-subsidize their service or given unfair regulatory advantages vis-à-vis their competitors.

In sum, the telcos' comments belie their policy recommendations. The Commission's regulatory scrutiny under Section 214 has in some cases prevented the telcos from cross-subsidizing the deployment of video facilities that would not otherwise have been economically viable or technologically optimal. Continued scrutiny of telco proposals -- whether to provide video dialtone or cable service -- is critical to ensure that telco entry into the video marketplace enhances rather than impairs or destroys competition.

Moreover, to the extent that requiring telcos that provide their own video programming to comply with the regulatory requirements that are imposed on other cable operators deters them from opting to provide video dialtone service, this, too, would promote rather than impair competition. Video dialtone, as the telcos generally concede, is not what the marketplace demands, and telcos that opt to provide such service should not be given an artificial regulatory advantage over cable operators.

It would be doubly inappropriate to exempt telco providers of video programming from particular rules and, at the same time, to allow telcos to benefit directly from the application of those same rules to cable operators. Yet, as we now show, that is exactly what the telcos seek with respect to cable's program access rules.

II. THE COMMISSION'S PROGRAM ACCESS RULES SHOULD APPLY TO PROGRAMMING OWNED BY TELEPHONE COMPANIES.

The program access rules generally prohibit vertically integrated cable programmers -- i.e., program services in which cable operators have an attributable ownership interest -- from

> engag[ing] in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[9/]

Among the practices deemed unfair and prohibited are exclusive contracts (except where determined by the Commission to be in the public interest) and discrimination in price, terms and conditions (except in certain enumerated circumstances).

In the present proceeding, the Commission has asked two related questions regarding the applicability of the program access rules to telcos that provide their own programming:

9/ 47 C.F.R. § 76.1001.

> Should the program access rules apply to LEC access to cable programming when a LEC is offering multichannel video programming service in competition with a franchised cable system, whether through the VDT framework or a franchised overbuilt cable system? Should the program access rules apply to LECs' programming in such situations?[10/]

Two telcos address the program access issue -- and each addresses a different half of the issue. Thus, Bell Atlantic argues that

> [v]ideo programmers offering multiple channels of video programming over video dialtone systems, therefore, fit squarely within the definition of [a multichannel video programming distributor ("MVPD")]. . . . There can be no question, therefore, that video programmers offering more than one channel of video programming over a video dialtone system are entitled to the benefit of the program access rules.[11/]

In other words, Bell Atlantic maintains that if it offers video dialtone service, it and other program providers on the video dialtone system should have access to programming owned by vertically integrated cable operators pursuant to the program access rules. But Bell Atlantic is silent on the question whether cable operators and other MVPDs should have similar

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<u>10</u>/ Notice of Inquiry, ¶ 90.

<u>11</u>/ Bell Atlantic Comments at 15-16 (footnotes omitted).

access to any programming in which it has an attributable interest.[12/]

NYNEX, while ignoring the question whether program packagers on a video dialtone system should have access to vertically integrated cable programming, maintains that cable operators and other MVPDs are not entitled to telco-owned programming provided over video dialtone systems:

> . . . Title VI, which includes the program access rules, does not apply when programming is provided by an affiliate of the common carrier VDT provider, as planned by NYNEX. When a LEC is a cable operator, the program access rules would apply.[13/]

If both Bell Atlantic and NYNEX were correct in their analysis, the result would be difficult to square with sound public policy. To promote competition, these rules unquestionably should apply symmetrically to the two facilities-based competitors in the video marketplace -- telephone companies and non-telco cable operators. Courts, economists and antitrust enforcement agencies generally recognize that, in a competitive marketplace, exclusivity and differential pricing can promote rather than inhibit competition.[14/] But any procompetitive

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12/ Bell Atlantic argues elsewhere in its comments, however, that "no franchise should be required for, and no additional Title VI regulations imposed on" telcos and affiliated programmers providing video dialtone service. Bell Atlantic Comments at 7 (emphasis added).

13/ NYNEX Comments at 10-11.

14/ See D. Ginsburg, "Vertical Restraints: De Facto Legality Under the Rule of Reason," 60 Antitrust L.J. 67 (1991).

effects of these marketing approaches would be vitiated if one competitor were allowed to use them while they were foreclosed to another.

For example, a telephone company's video service and a competing cable system might each seek to differentiate its product and attract subscribers by offering particular programming on an exclusive basis. In these circumstances, exclusivity might encourage the development of new and better program services, improving the overall quality and diversity of service available to consumers. If exclusivity were generally prohibited, competition between the two facilities-based providers would continue but would focus more on prices and less on programming, to the possible detriment of new programmers.

But if programming owned by telco video providers could be offered on an exclusive basis while programming owned by cable operators could not, competition would be artificially and unfairly skewed to the disadvantage of cable operators. In these circumstances, the telephone company's video service could attract subscribers by offering telco-owned programming that was unavailable elsewhere. But cable operators could not compete by offering <u>their</u> programming on an exclusive basis. Telcos would gain a critical advantage in their competition with cable operators to provide broadband facilities and services, and this advantage would have absolutely nothing to do with superior efficiency or skill.

Moreover, telco-owned programming services would gain unique promotional advantages over cable-owned programming, further tilting cable-telco competition in favor of the telcos. Programmers reap competitive benefits from exclusivity because a packager has incentives to advertise and promote programming that is unavailable from competing providers. On the other hand, packagers have little incentive to advertise and promote programming that is not unique to their systems.

Fortunately, current law neither compels nor permits this anomalous and anticompetitive result. For reasons that Comcast has set forth at length in comments on the Fourth Further Notice of Proposed Rulemaking in the Commission's video dialtone rulemaking proceeding and elsewhere, NYNEX is wrong: A telephone company that provides programming directly to subscribers over its own facilities _is_ a cable operator, _regardless_ of whether or not the telco facilities are used to provide video dialtone service. Therefore, programming in which such a telco owns an attributable interest would be subject to the program access rules to the same extent as programming owned by cable operators -- so that treating telco video dialtone program packagers as MVPDs would produce a symmetrical, pro-competitive result.

If, on the other hand, the Commission were somehow to conclude that telcos can provide their own programming over video dialtone facilities without being deemed cable operators -- and that, therefore, the program access rules did not apply to telco-owned programming -- it would be anticompetitive and unfair to give telco packagers on video dialtone facilities mandatory access to cable-owned programming. If there were any basis in the canons of statutory construction to support such a result, the Commission should seek to avoid it by finding an alternative construction of either the definition of a cable operator or the definition of an MVPD.

But such efforts are not necessary because the law supports the appropriate public policy outcome. The program access rules apply symmetrically to the two principal facilities-based competitors: Telco video dialtone packagers are beneficiaries of the rules with respect to cable-owned programming, and cable operators are beneficiaries of the rule with respect to telco-owned programming.

CONCLUSION

The goal of promoting sustained facilities-based competition in the provision of video programming and telecommunications services is not advanced by treating the telcos as "fledgling entrants" in the marketplace. Rules and safeguards designed to prevent anticompetitive conduct are not impeding the competitive provision of video services by telcos; to the contrary, such rules are necessary to prevent the telcos from using their dominance in the provision of essential telephone services to destroy competition in the provision of video programming and eliminate the prospect of facilities-based competition. There is no basis for relieving telcos, when they engage in the provision of video programming, from the rules and requirements that apply to cable operators. And, in particular, there is no basis for requiring cable operators, pursuant to the program access rules, to make their program services available to telco distributors of video programming while allowing the telcos to deny their own programming to competing cable operators.

Respectfully submitted,

COMCAST CABLE COMMUNICATIONS, INC.

Brenda L. Fox
Michael S. Schooler
Steven F. Morris

Dow, Lohnes & Albertson
1255 Twenty-Third Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2500

Its Attorneys

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